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Cover Page Footnote

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United States v. Rodriguez-Roman: **Prosecuting the Persecuted**

I. Introduction

Throughout the Fidel Castro reign, the state of Cuba has consistently deprived its citizens of rights and opportunities routinely available in the United States and throughout the Western Hemisphere.¹ Under Castro, the Cuban government consistently has denied its citizens freedom of speech, freedom of religion, freedom of the press, and the freedom to associate—suppressing their basic human liberties.² Suffocating from an embargo imposed by the United States, the poor economic state of Cuba has further beleaguered its already depressed population.³ For the past three decades, Cubans have looked to America for refuge and have been greeted with open arms during much of this period.⁴ To those escaping Cuba, the United States has offered the hope of freedom—but this freedom has not come without risk. Those illegally leaving Cuba have risked severe punishment by the Castro regime and by its criminal laws if returned.⁵

In August 1994, the hospitable policy of the United States toward Cuban refugees began to change.⁶ On August 6, 1994, Fidel Castro declared that the government would no longer

¹ See Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited*, 9 GEO. IMMIGR. L. J. 479, 491.

² See generally *U.S. Policy in Support of Human Rights in Cuba, 1995: Before the Subcomm. on the Western Hemisphere of the Comm. on Int'l Relations*, 104th Cong. 10-23 (1995) (testimony of Michael Rannenberger) [hereinafter *U.S. Cuban Rights Policy*].

³ See Justin Burke, *Cubans Simmer with Discontent as Economy and Capital Crumble*, CHRISTIAN SCI. MONITOR, Aug. 12, 1994, at 1; Peter Grier, *Raft Crisis Points Out Need For Long-Term Cuba Policy*, CHRISTIAN SCI. MONITOR, Sept. 12, 1994, at 3.

⁴ See Deborah Ramirez, *U.S. Tightens Cuban: Policy Would Detain Illegal Arrivals*, SUN-SENTINEL, Dec. 29, 1996, at 1A; Ann Devroy & Daniel Williams, *In Reversal, U.S. to Accept Cubans Held at Navy Base*, WASH. POST, May 3, 1995, at A1.

⁵ See generally *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996).

⁶ See Ramirez, *supra* note 4, at 1A.

⁷ See Jones, *supra* note 1, at 492; Steven Greenhouse, *U.S. Will Return Refugees to Cuba in Policy Switch*, N.Y. TIMES, May 3, 1995, at A1, A14 (discussing chronology of Cuban refugee crisis).

interfere with Cubans departing for America.⁷ Subsequently, an exodus of more than 30,000 Cubans on rafts and small boats tried to cross the Florida Straits into South Florida, threatening an immigration crisis.⁸ Instead of allowing the refugees to enter the United States, the Clinton administration changed its receptive policy toward Cuban immigrants, diverting the boat people to refugee camps on U.S. military bases in Panama and Guantanamo Bay, Cuba.⁹ In the months following, President Clinton entered into a bilateral agreement with Cuba that, among other things, allowed the United States to intercept Cuban rafters and send them back to Cuba.¹⁰ The agreement also provided for the legal entrance of at least 20,000 Cubans per year into the United States, in addition to those granted "political asylum."¹¹ As part of this resolution, the United States and Cuba agreed to "ensure that no action [would be] taken against those migrants returned to Cuba as a consequence of their attempt to immigrate illegally."¹²

Unfortunately, illegally departed aliens still have reason to fear reprisal and imprisonment from the Cuban government despite its agreement to cease such punishment.¹³ Indeed, Cuba's "illegal exit" and "illegal entry" laws remain in effect, and assurances of non-punishment by the government are not sufficient to ensure the freedom of aliens upon their return to Cuba.¹⁴ Obtaining political asylum in the United States, therefore, remains critical for Cuban citizens who illegally leave their native country. Furthermore, in seeking political asylum in the United States, Cuban aliens today can expect more procedural obstacles amidst a climate that is

⁸ See Ramirez, *supra* note 4, at 1A; Devroy & Williams, *supra* note 4, at A1.

⁹ See Ramirez, *supra* note 4, at 1A.

¹⁰ See *id.*; Joint Communiqué on Migration, Sept. 9, 1994, U.S.-Cuba, 5 DEP'T ST. DISPATCH, 1994, at 603; Joint Statement on Migration, U.S.-Cuba, DEP'T ST. DISPATCH, May 2, 1995, at 397.

¹¹ See *id.*

¹² Joint Statement on Migration, U.S.-Cuba, DEP'T ST. DISPATCH, May 2, 1995, at 397.

¹³ See *U.S. Cuban Rights Policy*, *supra* note 2.

¹⁴ See *id.*

clearly becoming less receptive to Cuban immigration.¹⁵

Those who immigrate illegally to the United States may avoid deportation by proving they would be subject to persecution for their political views upon return to their former country.¹⁶ In *Rodriguez-Roman v. INS*,¹⁷ the United States Court of Appeals for the Ninth Circuit considered the issue of whether or not the punishment an alien faces for illegal departure constitutes political persecution or is simply punishment for committing crimes against Cuba.¹⁸ The Ninth Circuit granted political asylum to the Cuban man in *Rodriguez-Roman*, reversing the decision by the U.S. immigration authorities.¹⁹ This Note explores the facts and the holding of *Rodriguez-Roman* in Part II.²⁰ Part III examines the background law,²¹ and Part IV provides an analysis of the court's opinion and its potential effects on the future of Cuban immigration law.²² Finally, this Note concludes that the Ninth Circuit's interpretation in *Rodriguez-Roman* provides Cuban citizens with a blueprint for obtaining asylum, although new legislation may greatly curtail the federal judiciary's power to review similar cases in the future.²³

II. Statement of the Case

A. Facts

Francisco Lucas Rodriguez, born in Havana, was a citizen of Cuba who throughout his lifetime held anti-Communist beliefs.²⁴ While in Havana, he attended college and later became a teacher.²⁵ Discontented living within Cuba's Communist system, however,

¹⁵ See *supra* notes 6-12 and accompanying text.

¹⁶ See generally *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996).

¹⁷ *Id.*

¹⁸ See *id.* at 430-31.

¹⁹ See *id.* at 431.

²⁰ See *infra* notes 24-83 and accompanying text.

²¹ See *infra* notes 84-181 and accompanying text.

²² See *infra* notes 182-215 and accompanying text.

²³ See *infra* notes 216-20 and accompanying text.

²⁴ See *Rodriguez-Roman v. INS*, 98 F.3d 416, 419 (9th Cir. 1996).

²⁵ See *id.*

he desired to escape from its "injustices."²⁶ Rodriguez joined the merchant marine as part of his plan to escape.²⁷ As a crewmember of the merchant marine, he initially served on vessels that worked solely within Cuban waters.²⁸ Eventually he was allowed to sail on voyages into foreign waters.²⁹ Taking advantage of this opportunity, Rodriguez jumped ship and entered the United States while on his third trip abroad.³⁰ He applied for asylum on April 15, 1983.³¹

On January 6, 1986, Rodriguez was ordered to show cause why he should not be deported because of his illegal entrance into the United States.³² He conceded deportability, but requested asylum and withholding of deportation.³³ His request, made pursuant to subsections 243(h) and 208(a) of the Immigration and Nationality Act,³⁴ was based on his illegal departure from Cuba.³⁵ Rodriguez stated that leaving Cuba without the government's permission was a serious crime and viewed as an embarrassment to the government.³⁶

At an August 8, 1990 hearing on the merits of Rodriguez's application, Rodriguez testified that he despised the Communist system and had long planned to flee to the United States, with its opportunity for freedom.³⁷ He urged that he be granted asylum because if deported back to Cuba he would be imprisoned or even

²⁶ *See id.*

²⁷ *See id.* Rodriguez stated that the merchant marine is not considered part of the military. *See id.*

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.*

³² *See id.*

³³ *See id.*

³⁴ 8 U.S.C. §§ 1158(a), 1253(h) (1994).

³⁵ *See Rodriguez-Roman*, 98 F.3d at 418.

³⁶ *See id.* at 419. Rodriguez described his actions as particularly egregious under the Cuban law in light of the fact that he received an education from the government and that he was a crewmember of the merchant marine. *See id.* In his words, "he threw these [benefits provided by the government] in their face when [he] left the country." *Id.*

³⁷ *See id.*

executed because of his political beliefs.³⁸ Rodriguez further testified to the suffering imposed on his family for his actions. One of his brothers was jailed for months because the Cuban government believed he had aided Rodriguez in his escape.³⁹ Other family members lost their jobs, were continually watched by the government, and were considered outcasts within the community.⁴⁰

To further bolster his claim, Rodriguez presented two witnesses who had been political prisoners in Cuba. The first witness, Leon Franco, described the consequences of fleeing from Cuba after being given the right to travel abroad.⁴¹ According to Franco, such a person could expect "many years in prison for the crime of looking for freedom and [sic] possibly be shot."⁴² He also detailed the atrocious living conditions of inmates who were charged with fleeing Cuba.⁴³ According to the witness, the government subjected these inmates to abuse amounting to a "moral death," denied them visits and medical attention, and forced them to share cells with violent and deranged inmates.⁴⁴ The second witness, Romero Menendez, echoed many of the statements made by Franco.⁴⁵

B. The Immigration Judge's Order

Despite the potential abuses and incarceration Rodriguez

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See id.* at 419-20.

⁴¹ *See id.* at 420. Franco had been a prisoner in Cuba for nine years. *See id.* He based his statements on observations and conversations with prisoners who had left Cuba. *See id.*

⁴² *Id.* Franco testified that one who illegally departs from Cuba would be tried before the Court of Crimes Against State Security and sentenced to between three and twenty years in prison. *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.* Menendez, a prisoner for five years, did not see any inmates killed, but he did notice that many had "disappeared." *See id.*

faced, the Immigration Judge (IJ) denied his application for asylum.⁴⁶ At the outset of the order, the IJ agreed with Rodriguez's testimony that he detested the Communist system and that he had left Cuba "due to his political beliefs."⁴⁷ He also did not question that Rodriguez feared his arrest for leaving Cuba and that there was a "clear probability of [him] being arrested" upon return.⁴⁸ In addition, the IJ noted both Rodriguez's fear of a lengthy sentence and the testimony of the witnesses describing the potential punishment as "harsh, if not fatal."⁴⁹

The IJ determined, however, that Rodriguez would not be punished for his political beliefs, but for committing crimes against Cuba.⁵⁰ While the laws were violated in part because of Rodriguez's political beliefs, this did not mean the "laws [became] unenforceable as political persecution."⁵¹ The IJ concluded that he could not "take on the burden of assessing criminal penalties in a foreign country in the guise of political persecution."⁵² He further pointed to the United States execution of Private Eddie Slovik for desertion during World War II as an example of a government's attitude toward the type of crime committed by Rodriguez.⁵³ Rodriguez may have violated the law for political reasons but that did not make the punishment for illegal departure "political persecution."⁵⁴

C. The Board of Immigration Appeals Ruling

Rodriguez appealed the IJ's decision to the Board of Immigration Appeals (BIA), but, on December 1, 1994, the BIA

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.* at 421. Private Slovik was an American soldier during World War II who left his unit and was later convicted of military desertion and sentenced to death. *See WILLIAM BRADFORD HUIE, THE EXECUTION OF PRIVATE SLOVIK (1954)*. Hoping to slow the desertion rate of American troops, General Dwight D. Eisenhower signed the death warrant and Slovik was executed by firing squad in France on January 31, 1945. *See id.*

⁵⁴ *See Rodriguez-Roman*, 98 F.3d at 420.

affirmed the IJ's decision and dismissed the appeal.⁵⁵ The BIA adopted the IJ's opinion while independently noting the similarity between Rodriguez's request for asylum and past cases involving military desertion.⁵⁶ The BIA concluded that "whatever problems [Rodriguez] may encounter as a result of his illegal departure and desertion from the merchant marines will be the result of prosecution for violating the laws of Cuba, and that [those problems] will not constitute 'persecution.'"⁵⁷

D. The Ninth Circuit Ruling

On March 20, 1995, Rodriguez filed a petition for review with the United States Court of Appeals for the Ninth Circuit.⁵⁸ The Ninth Circuit granted the petition for review and, after hearing arguments, vacated the BIA's denial of asylum.⁵⁹ In an opinion by Judge Stephen Reinhardt, the court found that the principal issue in determining eligibility for asylum and withholding of deportation was whether the imminent punishment Rodriguez was to receive upon return to Cuba constituted "persecution."⁶⁰ While the Immigration and Nationality Act does not define "persecution," the Ninth Circuit found that the BIA was bound both to follow applicable case law and to consider the principles in

⁵⁵ See *id.* at 421.

⁵⁶ See *id.*

⁵⁷ *Id.*

⁵⁸ See *id.* at 420. Initially Rodriguez mistakenly filed a petition with the Eleventh Circuit where venue was improper. See *id.* The Eleventh Circuit returned the petition to Rodriguez and by the time Rodriguez filed the petition with the Ninth Circuit, the petition was not timely. See *id.*; see also 8 U.S.C. § 1105(a)(1) (1994) (requiring that petition be filed within ninety days of the BIA's decision). Despite the untimely filing, the Ninth Circuit addressed the merits of Rodriguez' appeal finding jurisdiction upon the federal transfer statute. See *Rodriguez-Roman*, 98 F.3d at 421-22 (finding that the purpose of the federal transfer statute is to, inter alia, help those litigants who were confused about the proper forum); see also 8 U.S.C. § 1631 (1994). Interestingly, Rodriguez's appeal was brought by two law students from Western State University College of Law in Fullerton under the supervision of their professor. See Dana Parsons, *They Tried Their Best and Helped a Cuban Refugee Go Free*, L.A. TIMES, Oct. 13, 1996, at B1. In an unusual gesture, the Ninth Circuit praised the two students for their "excellence." See *Rodriguez-Roman*, 98 F.3d at 416.

⁵⁹ See *id.* at 432. The Ninth Circuit instructed that Rodriguez be granted withholding of deportation and remanded to the Attorney General the issue of Rodriguez's entitlement to asylum. See *id.*

⁶⁰ See *id.* at 425-26

the *Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)*.⁶¹

The Ninth Circuit, referring to the BIA's decision as "Kafkaesque,"⁶² stated that the BIA's interpretation of "persecution," namely that Cuba's enforcement of its own laws could not constitute persecution no matter how severe the penalty, was not consistent with past case law or with the *Handbook*.⁶³ The court noted that "[past] cases stand for the proposition that punishment for the crime of illegal departure constitutes persecution when the punishment would be severe."⁶⁴ Furthermore, continued the court, a statute that criminalizes illegal departure imputes to the violator a political opinion that the state believes it should severely punish.⁶⁵

While the BIA was bound by relevant case law, the Ninth Circuit found that it also should have considered the principles found in the *Handbook*.⁶⁶ Because both the Supreme Court and circuit courts have followed the *Handbook* in earlier cases, the BIA should have looked to the *Handbook* to "provid[e] guidance . . . about 'procedures and criteria for determining refugee status.'"⁶⁷ Looking to the section of the *Handbook* construing the term "well founded fear of persecution,"⁶⁸ the court found that "an alien qualifies as a refugee under the *Handbook* if he can demonstrate that he would be subject to severe penalties for his illegal departure or unauthorized stay abroad and that he left or

⁶¹ See *id.* at 425; OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. Doc. HCR/PRO/4 (1979) [hereinafter HANDBOOK]. For a discussion of the *Handbook*, see *infra* notes 105-17 and accompanying text.

⁶² See *id.* at 420. "Kafkaesque" refers to the twentieth century writer Franz Kafka and relates to something that is "characterized by surreal distortion and usually a sense of impending danger." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 980 (3d ed. 1992).

⁶³ See *Rodriguez-Roman*, 98 F.3d at 427.

⁶⁴ *Id.*

⁶⁵ See *id.* at 430.

⁶⁶ See *id.* at 425.

⁶⁷ *Id.* (citing *Canas v. Segovia v. INS*, 902 F.2d 717, 722, 724 (9th Cir. 1990) (quoting HANDBOOK)).

⁶⁸ HANDBOOK, *supra* note 61, at 16, para. 61.

has remained abroad on account of . . . political opinion.”⁶⁹

Adding to this interpretation of “well founded fear of prosecution,” the court found that earlier cases, along with the *Handbook*, apply a more rigorous test.⁷⁰ In addition to showing the existence of severe penalties for illegal departure, the alien must prove that “he is one of the persons at whom the illegal departure statute was directed—persons who flee their homeland for political reasons.”⁷¹ The court explained, “[t]hus, severe punishment is deemed to be persecution only when the petitioner left his country or remained abroad *and* would face severe punishment for illegal departure.”⁷²

Applying the principles found in the earlier cases and the *Handbook*, the Ninth Circuit first considered Rodriguez’s petition for withholding of deportation under a “clear probability of persecution standard.”⁷³ Looking to the IJ’s decision, the court found that Rodriguez left Cuba because of his political opinions and that he faced a “clear probability” of punishment for the crime of illegal departure.⁷⁴ The court was then left with the question of whether the punishment Rodriguez would suffer would be “severe” and thus constitute “political persecution.”⁷⁵ Emphasizing that Rodriguez faced a prolonged prison sentence and possibly death, the court had little trouble concluding that “Rodriguez established a clear probability that he would face severe punishment for the crime of illegal departure.”⁷⁶ Based on these findings, the Ninth Circuit granted Rodriguez withholding of deportation and remanded the determination of Rodriguez’ entitlement to asylum to the Attorney General.⁷⁷

⁶⁹ *Rodriguez-Roman*, 98 F.3d at 426.

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *Id.* at 430.

⁷³ *Id.* at 430-31. The court considered the petition under the required standard for withholding deportation, which is more stringent than the standard for asylum. *See id.* If Rodriguez could meet this standard, he would “a fortiori” meet the less stringent standard for asylum. *See id.* at 431.

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See id.* at 432. The Ninth Circuit also dismissed the BIA’s analogy between

Judge Alex Kozinski,⁷⁸ in a concurring opinion, noted the gravity of judicial review of administrative agencies, stating that this can, "mean the difference between freedom and oppression and, quite possibly, life and death."⁷⁹ Harsh punishment for illegal departure, wrote Judge Kozinski, was a means of obtaining government allegiance where it could not be done in more traditional ways.⁸⁰ Cuba's placement of restricted emigration within the realm of its criminal laws could not "camouflage its atroci[ous] [punishment]" of individuals who wished to live under a non-Communist government.⁸¹ Furthermore, the need for judicial review where inevitable errors occur is magnified when an individual's life is in jeopardy.⁸² Judges Reinhardt and Hawkins, in a special concurrence, also agreed with the importance of judicial review in asylum cases. They found judicial review to be a safeguard to catch the most flagrant of mistakes, drawing a parallel to the massive turning away of Jewish refugees before and during World War II, many of whom eventually perished in Adolph Hitler's concentration camps.⁸³

III. Background Law

In *Rodriguez-Roman*, the Ninth Circuit had to determine the definition of "persecution" based on political opinion as applied to a Cuban criminal statute prohibiting an individual from departing the country without governmental permission. The court, interpreting the Refugee Act of 1980, relied on relevant statutes, case law, and the *Handbook*.

illegal departure and military desertion. *See id.* at 426 n.16. The court found that the circumstances of this case were different than military desertion and the analysis was "too appalling to require a response." *Id.* at 421 n.6. Furthermore, the court found that application of the rule found in the *Handbook* for military desertion would be ironic in light of the BIA's failure to utilize the *Handbook* regarding illegal departure. *See id.*; *HANDBOOK*, *supra* note 61, at 39-40, paras. 167-71.

⁷⁸ Judge Kozinski grew up in Communist Romania and came to the United States in 1962. *See Abroad at Home: The Rest is Silence*, N.Y. TIMES, Nov. 11, 1996, at A15.

⁷⁹ *Rodriguez-Roman*, 98 F.3d at 432 (Kozinski, J., concurring).

⁸⁰ *See id.* (Kozinski, J., concurring).

⁸¹ *Id.* (Kozinski, J., concurring).

⁸² *See id.* at 433 (Kozinski, J., concurring).

⁸³ *See id.* (Reinhardt, J., & Hawkins, J., specially concurring).

A. The Refugee Act of 1980

In 1980, Congress passed the Refugee Act of 1980,⁸⁴ which amended the existing Immigration and Nationality Act (INA).⁸⁵ The Refugee Act was implemented to conform the United States refugee law with the United Nations Protocol Relating to the Status of Refugees⁸⁶ which had been acceded to by the United States in 1968.⁸⁷ The Refugee Act offers two routes for an alien facing deportation: asylum and withholding of deportation.⁸⁸

The United States Attorney General may grant asylum under section 208(a) of the Refugee Act⁸⁹ only if she determines that such alien is a "refugee" within the meaning of section 1101(a)(42)(A).⁹⁰ For purposes of section 1101(a)(42)(A), a "refugee" is a person who cannot return to his or her country "because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion"⁹¹ After the "refugee" status is initially determined, however, the granting of asylum is purely discretionary for the Attorney General.⁹²

The second form of relief for an alien is withholding of deportation.⁹³ Under section 243(h) of the Refugee Act, the

⁸⁴ 8 U.S.C. §§ 1101(a)(42), 1157-59, 1253(h), 1521-24 (1980).

⁸⁵ 66 Stat. 163 (1952).

⁸⁶ Protocol Relating to the Status of Refugees, opened for signature, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁸⁷ See *INS v. Stevic*, 467 U.S. 407 (1984). The Protocol bound parties to the provisions of articles two through thirty-four of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951). See *id.* at 416. Thus, the Refugee Act incorporates the terms of the Convention although the United States is not a signatory member to the Convention. See *id.* at 416 n.9.

⁸⁸ See 8 U.S.C. §§ 1158, 1253(h) (1994).

⁸⁹ The asylum section provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1158(a).

⁹⁰ See *id.*

⁹¹ *Id.* § 1101(a)(42)(A).

⁹² See *id.* § 1158(a).

⁹³ See *id.* § 1253(h).

Attorney General is required to withhold deportation of an alien if the alien can show that his or her "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion."⁹⁴ Thus, unlike the process for asylum, which gives the Attorney General discretion, withholding deportation is mandatory upon the required showing.

The respective burdens of proof that an alien must show for withholding of deportation and asylum differ. In *INS v. Stevic*,⁹⁵ the Supreme Court, interpreted the "would be threatened" language of section 243(h) to mean that an alien requesting withholding of deportation must establish a "clear probability of persecution."⁹⁶ The Court failed to go any deeper into the "clear probability" standard other than noting that the evidence must show "that it is more likely than not that the alien would be subject to persecution."⁹⁷ Furthermore, the *Stevic* Court left open the issue of the burden of proof required for asylum and its "well founded fear" language.⁹⁸ Three years later, in *INS v. Cardoza-Fonseca*,⁹⁹ the Supreme Court addressed the issue avoided by the *Stevic* Court. The Supreme Court determined that the "clear probability of persecution" standard found in withholding of deportation proceedings did not govern section 208(a) asylum requests and the "well-founded fear" language contained therein.¹⁰⁰ Instead, an alien seeking to show a "well-founded fear of persecution" need only show that the persecution is a "reasonable possibility."¹⁰¹ The Court acknowledged the ambiguity of the term "well-founded fear," but did not further refine the test.¹⁰² The only way to give such a term a "concrete meaning," the Court explained, was

⁹⁴ *Id.*

⁹⁵ 467 U.S. 407 (1984).

⁹⁶ *Id.* at 430.

⁹⁷ *Id.* at 429-30.

⁹⁸ *See id.* at 430.

⁹⁹ 480 U.S. 421 (1987).

¹⁰⁰ *See id.* at 434-36.

¹⁰¹ *Id.* at 440 (quoting *INS v. Stevic*, 467 U.S. 407, 424-25 (1984)).

¹⁰² *See id.* at 448.

“through a process of case-by-case adjudication.”¹⁰³ Thus, other than distinguishing the two standards found in section 208(a) and 243(h), no definition of a “well founded fear” was given and courts were urged to respect agency decisions when faced with the issue.¹⁰⁴

B. United Nations Handbook on Procedures and Criteria for Determining Refugee Status

The *United Nations Handbook on Procedures and Criteria for Determining Refugee Status*¹⁰⁵ was published in 1979 by the Office of the United Nations High Commissioner for Refugees. It was intended to provide guidance to governments about “procedures and criteria for determining refugee status.”¹⁰⁶ For instance, the *Handbook* interprets the phrase “well founded fear of persecution” and states the circumstances where punishment for unlawful departure constitutes such “persecution.”¹⁰⁷

In particular, the section interpreting “well-founded fear of persecution” states:

[t]he legislation of certain States imposes severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is a reason to believe that a person, due to his illegal departure . . . is liable to such severe penalties, his recognition as a refugee will be justified if it can be shown that his motives for leaving . . . [involve political opinion].¹⁰⁸

To qualify as “political persecution,” the alien must show that she has opinions different from the government and that she fears persecution for having those opinions.¹⁰⁹ According to the *Handbook*, prosecution by a government can be, in some circumstances, a pretext for persecution based on political

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ HANDBOOK, *supra* note 61.

¹⁰⁶ *Id.* at 1.

¹⁰⁷ *See id.* at 16, para. 61; *see also* Rodriguez-Roman v. INS, 98 F.3d 416, 426 (9th Cir. 1996).

¹⁰⁸ HANDBOOK, *supra* note 61, at 16, para. 61.

¹⁰⁹ *See id.* at 19, para. 80.

opinion.¹¹⁰ If the prosecution is a result of a politically motivated act and the punishment is in accordance with the general laws of a country, however, such prosecution will not necessarily be political persecution.¹¹¹ Therefore, punishment for illegal departure is not per se political persecution, but it can constitute such persecution under the right circumstances.

Although the *Handbook* is not binding on the Immigration and Naturalization Service, the Supreme Court and the Ninth Circuit have looked to it for guidance.¹¹² In *Cardoza-Fonseca v. INS*,¹¹³ the Supreme Court was faced with, among other things, defining the term "refugee."¹¹⁴ To aid its interpretation, the Court noted that they "[were] guided by the analysis set forth in the [*Handbook*]."¹¹⁵ The *Handbook* was found to provide direction in interpreting the United Nations Protocol, with which Congress sought to conform when drafting the Refugee Act.¹¹⁶ The *Handbook* "has been widely considered useful in giving content to the obligations that the Protocol establishes."¹¹⁷

C. Case Law

1. Political Persecution or Criminal Penalties

An alien seeking asylum and withholding of deportation must show that his potential persecution would be based on the alien's "race, religion, nationality, membership in a particular social group, or political opinion."¹¹⁸ It is also well established that individual nations have a "sovereign right" to enforce their own

¹¹⁰ See *id.* at 20, paras. 84, 85.

¹¹¹ See Gregory S. Porter, *Persecution Based on Political Opinion: Interpretation of the Refugee Act of 1980*, 25 CORNELL INT'L L.J. 231, 260 (1992).

¹¹² See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir. 1995).

¹¹³ 480 U.S. 421 (1987).

¹¹⁴ See *id.* at 438.

¹¹⁵ *Id.* at 439. "We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any way binds the INS with reference to the asylum provision of § 208(a)." *Id.* at 439 n.22.

¹¹⁶ See *id.* at 439 n.22.

¹¹⁷ *Id.*

¹¹⁸ 8 U.S.C. § 1101(a)(42)(A) (1994).

laws.¹¹⁹ For instance, “[c]riminal prosecution for illegal departure is generally not considered to be persecution.”¹²⁰ This general rule has exceptions, however, such as where the prosecution results in severe punishment.¹²¹ In this situation, despite the generally applied criminal statute, the persecutor is viewed as having “imputed a political opinion” to those leaving its borders.

In the 1969 case of *Kovac v. INS*,¹²² the petitioner defected from Yugoslavia and sought asylum in the United States.¹²³ Kovac insisted that if returned to Yugoslavia he would be imprisoned because his departure would be considered “open defiance and denunciation of Communism.”¹²⁴ The Ninth Circuit overturned the BIA’s denial of asylum finding that although Congress did not intend to provide refuge for “common criminals,” it did intend to grant asylum for “those who would, if returned, be punished criminally for violating a politically motivated prohibition against defection from a police state.”¹²⁵

The *Kovac* court, determining that punishment for illegal departure can constitute “political persecution,” relied on a previous BIA decision, *Matter of Janus & Janek*.¹²⁶ In *Janus*, two Czechoslovakian citizens who were members of the Communist Party entered the United States as nonimmigrants for pleasure.¹²⁷ After overextending their authorized stays, the two Czechoslovakians applied for withholding of deportation status under section 243(h) claiming that they would be subjected to

¹¹⁹ See Cynthia Isaacs, Note, *The Torch Dims: The Ambiguity of Asylum and the “Well-Founded Fear of Persecution” Standard in Sandeghi v. INS*, 20 N.C. J. INT’L L. & COM. REG. 721, at 730–31; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 431(1), (3) (1992).

¹²⁰ *Li v. INS*, 92 F.3d 985, 988 (9th Cir. 1996).

¹²¹ See *id.*; see also *Ramirez-Rivas v. INS*, 899 F.2d 864, 868 (9th Cir. 1990) (stating that prosecution of one who is guilty of criminal acts can constitute “persecution on the basis of political opinion if the punishment is excessive or arbitrary”).

¹²² 407 F.2d 102 (9th Cir. 1969).

¹²³ See *id.*

¹²⁴ *Id.* at 104.

¹²⁵ *Id.*

¹²⁶ 12 I. & N. Dec. 866 (1968).

¹²⁷ See *id.* at 867. Despite their past membership in the Communist Party, the two eventually denounced the government and its Communist form. See *id.* at 870–71.

political persecution if returned.¹²⁸ A conviction by Czechoslovakia had already been entered against them in absentia under its Article 109 of the Criminal Law entitled "Defection from the Republic."¹²⁹ Article 109 covered "(1) a person who leaves Czechoslovakia without permission, (2) a Czechoslovak citizen who remains in a foreign country without permission, and (3) one who organizes either of those acts or leads a group or groups of people across the border, they being without permits to leave the country."¹³⁰

The BIA admitted that not every alien who is punished for violating a travel restriction has experienced "political persecution."¹³¹ A person who leaves a country with no political motivation or who fails to return for a reason unrelated to politics "is not entitled to a section 243(h) stay solely on the basis that he may face criminal prosecution for overstay."¹³² Conversely, statutes criminalizing departure can serve political purposes.¹³³ Whether an illegal departure law will be characterized as political depends upon "the provisions of the particular statute and the manner in which it is administered."¹³⁴ An alien who has not expressed opposition to the government prior to his illegal flight may be allowed relief if he can show that his departure was politically motivated and the punishment he faces upon return is similarly political.¹³⁵

Both the Ninth Circuit and the BIA have, in some circumstances, failed to recognize an alien's claim of political

¹²⁸ See *id.* at 869.

¹²⁹ See *id.*

¹³⁰ *Id.* at 869-70. The applicants were found in violation of the second category and classified as defectors from the republic. See *id.* One of the aliens was to be imprisoned for one year and had most of his property confiscated; the other faced an eight-month sentence. See *id.* The two claimed that, in addition to the sentences, they could expect harsher punishment on their return. See *id.* at 870-71.

¹³¹ See *id.* at 876.

¹³² *Id.* For example, an alien who finds his economic situation in the United States advantageous and does not want to return to his country would not be able to claim "political persecution" on the basis of an impending criminal penalty for leaving his country. See *id.*

¹³³ See *id.* at 873.

¹³⁴ *Id.*

¹³⁵ See *id.* at 876.

persecution where the prosecution was not found to be severe. In *Li v. INS*,¹³⁶ for instance, the petitioner escaped from China to the United States seeking asylum.¹³⁷ The petitioner claimed that he would be tortured and detained because his departure would be equated with an anti-China political opinion.¹³⁸ The "severe punishment" assertion was rebutted, however, causing the court to doubt that the petitioner would be subject to the year in prison provided in the criminal code.¹³⁹ Furthermore, although the *Li* court initially recognized the theory of "imputed political opinion,"¹⁴⁰ it distinguished that theory from the petitioner's situation.¹⁴¹ To the court, no political opinion was being imputed to the petitioner because, inter alia, it appeared that the petitioner could expect the same punishment that awaited other emigrants.¹⁴²

2. Imputed Political Opinion

To gain asylum, a petitioner must prove he holds a political opinion.¹⁴³ An asylum seeker can establish his political opinion on the basis of his own affirmative opinion,¹⁴⁴ his political neutrality,¹⁴⁵ or a political opinion attributed to him by his persecutors, otherwise known as an imputed political opinion.¹⁴⁶ In *Rodriguez-Roman*, the court applied the imputed political opinion doctrine to Rodriguez's situation,¹⁴⁷ while also requiring

¹³⁶ 92 F.3d 985 (9th Cir. 1996).

¹³⁷ See *id.* at 987-88.

¹³⁸ See *id.* at 988.

¹³⁹ See *id.*

¹⁴⁰ For a discussion of "imputed political opinion," see *infra* notes 149-71 and accompanying text.

¹⁴¹ See *Li*, 92 F.3d at 988.

¹⁴² See *id.* The court stated that, "[t]o accept Petitioner's argument on this point would effectively open our borders to unlimited immigration." *Id.*

¹⁴³ See *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997).

¹⁴⁴ See *id.* at 1488. Affirmative political beliefs have been established by past activities or by testimony. See *id.*

¹⁴⁵ See *id.* Political neutrality occurs in an environment in which holding a neutral opinion is hazardous. See *id.* It may be established by pronouncements, actions, and may include the absence of a political opinion. See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *Rodriguez-Roman v. INS*, 98 F.3d 416, 430 (9th Cir. 1996).

him to show his affirmative opinion.¹⁴⁸

The theory that severe prosecution can amount to political persecution rests on the doctrine of imputed political opinion.¹⁴⁹ This doctrine allows a finding of a well-founded fear of persecution even when an alien "holds no opinion, or holds an opinion different than that attributed to him or her" if "the persecutor believes that the alien holds such an opinion and persecutes the alien for that reason."¹⁵⁰ Among the circuit courts, the "imputed political opinion" doctrine has been utilized most often by the Ninth Circuit.¹⁵¹

An imputed political opinion is not limited to illegal departure statutes and can be found in a number of contexts.¹⁵² Moreover, to establish an imputed political opinion, it is generally the persecutor's views that are relevant, not the views of the victim.¹⁵³ Addressing cases that did not involve punishment for illegal departure, the Ninth Circuit has been willing to find "political persecution," despite a lack of political motivation by the asylum seeker.¹⁵⁴ In *Aguilera-Cota v. INS*,¹⁵⁵ the applicant for asylum did not express a "'political' opinion in the typical fashion [but] fit[] within the statutory definition of that term under the doctrine of imputed political opinion."¹⁵⁶ To grant the requested relief, the court had to find an imputed political opinion because the alien expressed none.¹⁵⁷ Likewise, in *Lazo-Majano v. INS*,¹⁵⁸ the Ninth

¹⁴⁸ See *Sangha*, 103 F.3d at 1488.

¹⁴⁹ See *Rodriguez-Roman*, 98 F.3d at 430.

¹⁵⁰ Porter, *supra* note 111, at 248; see Bill Coffman, *Organization Membership and Political Opinion as Grounds for Refugee Status*, 18 HOUS. J. INT'L L. 465, 484 (1996).

¹⁵¹ See Sachin D. Adarkar, *Political Asylum and Political Freedom: Moving Towards a Just Definition of "Persecution on Account of Political Opinion" Under the Refugee Act*, 42 UCLA L. REV. 181, 190 & n.50 ("A district court within the Seventh Circuit is the only other court to have explicitly upheld an asylum claim under the doctrine of imputed political opinion.").

¹⁵² See *id.*

¹⁵³ See *Sangha*, 103 F.3d at 1488.

¹⁵⁴ See *infra* notes 155-72 and accompanying text.

¹⁵⁵ 914 F.2d 1375 (9th Cir. 1990).

¹⁵⁶ *Id.* at 1379. The government threats faced by the petitioner were based on his employment and because of his perceived adherence to the government's cause. See *id.* The BIA and the IJ refused to recognize the theory of imputed political opinion. See *id.*

¹⁵⁷ See *id.*; see also Coffman, *supra* note 150, at 485; Porter, *supra* note 111, at 248 n.126.

Circuit noted in dicta that "even if [the applicant] had no political opinion and was innocent of a single reflection on the government of her country, the cynical imputation of political opinion to her is what counts"¹⁵⁹

Where an applicant has requested asylum on the basis of punishment for illegal departure, however, it is generally held that the person must have fled her homeland for political reasons.¹⁶⁰ Thus, the victim's view is relevant if she is relying on the fact that she will be severely punished for leaving the country.¹⁶¹ The BIA and the Ninth Circuit have allowed varying degrees of protestation to suffice for this type of asylum claim, though. In some situations, merely holding conflicting views, without expressing these views, has been enough to gain asylum, while other authorities have denied relief because of a lack of political expression.¹⁶² Regardless of the required level of political expression, the validity of the imputed political opinion in such situations remained.

In 1992, however, the Supreme Court decided *INS v. Elias-Zacarias*,¹⁶³ which seems to undermine the theory of imputed political opinion. Elias-Zacarias was a native Guatemalan, who guerrillas had attempted forcibly to conscript into fighting for their cause.¹⁶⁴ Fearing government retaliation, Elias-Zacarias refused to join the guerrilla group and fled to the United States, where he sought political asylum.¹⁶⁵ Justice Scalia, writing for the majority, found that political persecution is "persecution on account of the

¹⁵⁸ 813 F.2d 1432 (9th Cir. 1987), *overruled on other grounds*, *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

¹⁵⁹ *Id.* at 1435.

¹⁶⁰ See *Kovac v. INS*, 407 F.2d 102, 104 (9th Cir. 1969); *Matter of Janus & Janek*, 12 I. & N. Dec. 866, 876 (1968); *Matter of Sibrun*, 18 I. & N. Dec. 354, 359 (1983).

¹⁶¹ See *Kovac*, 407 F.2d at 104; *Janus*, 12 I. & N. Dec. at 876.

¹⁶² Compare *Janus*, 12 I. & N. Dec. at 874 (finding that because the applicant had never expressed an adverse political opinion the government could have no political motivation to punish him), with *Matter of Sibrun*, 18 I. & N. Dec. 354, 359 (1983) (granting relief even though the applicant was a member of the Communist party and had never publicly denounced Communism). The Ninth Circuit cases, prior to *Rodriguez-Roman*, have addressed facts where the petitioner had some political expression. See, e.g., *Kovac*, 407 F.2d 102 (9th Cir. 1969).

¹⁶³ 502 U.S. 478 (1992).

¹⁶⁴ See *id.* at 479.

¹⁶⁵ See *id.* at 480.

victim's political opinion, not the persecutor's."¹⁶⁶ The Court held that to gain political asylum the applicant must show that he has a firmly held political opinion and that he would be persecuted because of that opinion.¹⁶⁷ While this brought the imputed political opinion doctrine into question, the Court implied that doctrine's vitality holding that there was no "indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias-Zacarias' refusal was politically based."¹⁶⁸

Following *Elias-Zacarias*, the Ninth Circuit answered any lingering questions about whether the imputed political opinion doctrine was valid. In *Canas-Segovia v. INS*,¹⁶⁹ the court confirmed that "imputed political opinion [was] still a valid basis for relief."¹⁷⁰ To fit within the requirements of *Elias-Zacarias*, the Ninth Circuit found that by definition, the imputed opinion includes elements of motive.¹⁷¹ Under the Refugee Act, the persecutor's imputed view becomes the applicant's required political opinion.¹⁷²

D. Standard of Review of the Board of Immigration's Decision

A determination by the BIA that an alien is not eligible for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole."¹⁷³ A court may reverse a decision to grant asylum only if the evidence was such that no reasonable factfinder could conclude that the required fear of persecution did not exist.¹⁷⁴ To reverse the BIA finding, it is not enough that the evidence supports the reversal; the evidence must "compel[] it."¹⁷⁵ Even though the BIA's

¹⁶⁶ *Id.* at 482.

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ 970 F.2d 599 (9th Cir. 1992).

¹⁷⁰ *Id.* at 601.

¹⁷¹ *See id.* at 602.

¹⁷² *See Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997).

¹⁷³ 8 U.S.C. § 1105(a)(4) (1994); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

¹⁷⁴ *See Elias-Zacarias*, 502 U.S. at 483-84.

¹⁷⁵ *Id.* at 481 n.1.

interpretations of the Immigration and Nationality Act are reviewed de novo, such interpretations are given substantial deference.¹⁷⁶

Where the Congressional intent from the statute is clear, the BIA and the reviewing court must give effect to this definite congressional meaning.¹⁷⁷ If the Congressional intent is ambiguous, however, the court may only question whether the agency's determination is "based on a permissible construction of the statute."¹⁷⁸ The INA does not define the term "persecution"; therefore, the courts must defer to the BIA's determination unless it is "arbitrary, capricious, or manifestly contrary to the statute."¹⁷⁹ In interpreting the INA, however, the Ninth Circuit has found that the BIA is bound by evaluations in earlier case law.¹⁸⁰ Thus, while the BIA's individual determination is given great weight, it must be consistent with prior decisions.¹⁸¹

IV. Significance of the Case

The Ninth Circuit's ruling in *Rodriguez-Roman* is important for two reasons. First, the court's decision requires asylum seekers to fulfill an additional test,¹⁸² beyond proving severe punishment, and then makes this test close to meaningless by allowing it to be easily satisfied. Second, *Rodriguez-Roman* demonstrates the Ninth Circuit's desire to review BIA denials of asylum despite case law urging it to show deference to the BIA.¹⁸³

The overriding proposition of *Rodriguez-Roman* appears to be that, "punishment for the crime of illegal departure constitutes persecution when the punishment would be severe."¹⁸⁴ The

¹⁷⁶ See *Fisher v. INS*, 79 F.3d 955, 961 (1996) (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

¹⁷⁷ See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

¹⁷⁸ *Id.* at 843.

¹⁷⁹ *Fisher*, 79 F.3d at 961 (quoting *Romero v. INS*, 39 F.3d 977, 980 (9th Cir. 1994)).

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² *Rodriguez-Roman v. INS*, 98 F.3d 416, 427 (9th Cir. 1996).

¹⁸³ *Id.* at 432-33 (Kozinski, J., concurring).

¹⁸⁴ *Id.* at 430.

Rodriguez-Roman court added a more rigorous test to its finding—the alien must have fled his homeland for political reasons.¹⁸⁵ Prior to *Rodriguez-Roman*, the Ninth Circuit was willing to find political persecution based on the imputed political opinion doctrine where the alien had no political opinion.¹⁸⁶ Following *Canas-Segovia*, the imputed political opinion doctrine remained valid, but whether or not an alien relying on the doctrine had to show his own political motivation for leaving the country remained vague.¹⁸⁷ Because the Ninth Circuit in *Canas-Segovia* found that the imputed political opinion doctrine automatically included elements of motive,¹⁸⁸ it would have been conceivable for the *Rodriguez-Roman* court to do away with the *Kovac* requirements that the applicant have a political motivation for leaving his native country.¹⁸⁹ Such a rule would have allowed Cuban immigrants to gain asylum in the United States even if they left for reasons wholly nonpolitical—e.g., fear of combat, desire to be with one's family, or desire to obtain a better economic situation. Essentially, this would have opened the borders to all Cubans as long as they could prove the punishment they would face upon return would be severe, which had already been determined in *Rodriguez-Roman*.

The *Rodriguez-Roman* court instead cited *Kovac*, applying the added test that the alien must have had a political motivation for leaving his country.¹⁹⁰ This additional test seemingly eliminates aliens who claim to leave their countries for nonpolitical reasons. In light of the court's reference to abuses overseas and emphasis on "treating the refugees with sensitivity, compassion, and care[.]"¹⁹¹ the more rigorous test seems, on its face, somewhat surprising.

To the contrary, the *Rodriguez-Roman* decision can act as a manual on successfully gaining political asylum from Cuba. In

¹⁸⁵ See *id.*

¹⁸⁶ See *supra* notes 154-59 and accompanying text.

¹⁸⁷ See *supra* notes 163-71 accompanying text.

¹⁸⁸ See *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992).

¹⁸⁹ See *Kovac v. INS*, 407 F.2d 102, 104 (9th Cir. 1969).

¹⁹⁰ See *Rodriguez-Roman v. INS*, 98 F.3d 416, 427 (9th Cir. 1996).

¹⁹¹ *Id.* at 433 (Reinhardt, J., & Hawkins, J., specially concurring).

finding that Rodriguez was politically motivated in leaving Cuba, the Ninth Circuit, relying on the IJ's decision, found it convincing that Rodriguez "harbored life-long anti-Communist sympathies."¹⁹² Future Cuban emigrants, even if leaving for nonpolitical reasons, may obtain political asylum by declaring their similar hatred of the Communist system because, under *Rodriguez-Roman*, the prosecution the emigrant faces upon return has already been declared "severe."¹⁹³ The type of political expression required by the courts will, therefore, become a key issue.

In *Kovac*, the petitioner affirmatively refused to perform the requests of Yugoslavian secret police.¹⁹⁴ The BIA in *Janus*, however, granted the petitioner relief even though he was a member of the Communist Party and he made "no claim that he ever publicly denounced the [Communist] Party, although he was always opposed to Communism."¹⁹⁵ The petitioner claimed to have been a member of the Communist Party out of necessity and to protect his family.¹⁹⁶ In *Sibrun*, the BIA felt that the alien's failure to publicly denounce the government signified that the government could have no motivation to punish him and, therefore, denied him relief.¹⁹⁷ Of these views, the *Rodriguez-Roman* court sided with the BIA in *Janus* and allowed Rodriguez to prove his political motivation for leaving by simply giving testimony that he detests the government.¹⁹⁸ Thus, Cuban immigrants in the Ninth Circuit will now be able to prove their political motivation for leaving Cuba with less effort—i.e., by merely stating they abhor Cuba's government.

Rodriguez-Roman also signified the Ninth Circuit's declaration of its intent to judicially review immigration cases.¹⁹⁹ Without this

¹⁹² *Id.* at 420.

¹⁹³ *See id.* at 431.

¹⁹⁴ *See Kovac*, 407 F.2d at 104. Kovac was asked to mingle among Hungarian refugees and inform the police of the refugees' activities. *See id.*

¹⁹⁵ *Matter of Janus & Janek*, 12 I. & N. Dec. 866, 874 (1968).

¹⁹⁶ *See id.*

¹⁹⁷ *See Matter of Sibrun*, 18 I. & N. Dec. 354, 358 (1983).

¹⁹⁸ *See generally Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996).

¹⁹⁹ *See id.* at 432-33 (Kozinski, J., concurring). "[A]gencies are run by people and people make mistakes. Review by a tribunal outside the agency helps correct these rare but tragic errors . . . [T]he effort is surely worth the candle." *Id.* at 433 (Kozinski, J.,

added review, the court believed that "grave injustices" could take place and, although courts are subject to error, it acts as a "safety mechanism" that can catch administrative errors.²⁰⁰ According to the case law, however, review should be confined to interpretations that are "arbitrary, capricious or manifestly contrary to the statute."²⁰¹

To be sure, the BIA and the Ninth Circuit agreed that Rodriguez would be subject to a lengthy prison sentence or possibly even death upon his return to Cuba, and that the BIA did not utilize the imputed political opinion doctrine.²⁰² Within this setting, the court's review of the BIA's denial of asylum looks more like a compassionate correction than reviewing an egregious error. Consider, however, that the Ninth Circuit viewed much milder sentences as "severe penalties," and future courts, utilizing this, may view *Rodriguez* as a license to overturn any BIA determinations on the basis that the punishment is severe. For instance, the State Department reported that Rodriguez would be subject to a three-year sentence, not the twenty-year sentence urged by the defense.²⁰³ Even accepting this contention, the court found this penalty sufficiently severe to constitute persecution.²⁰⁴ Indeed, relying on *Janus*, the court noted that even a one-year sentence for illegal departure constituted "severe punishment."²⁰⁵ Just how minor a sentence the Ninth Circuit is willing to accept as "severe punishment" is not clear. A line must exist below which the length of punishment is not considered severe; a "brief confinement for illegal departure, although 'repugnant to [the United States] concept of justice,' would not fall within the ambit of persecution."²⁰⁶ Still, the term "brief confinement" is difficult to ascertain and is subject to a court's interpretation.²⁰⁷ Therefore, a

concurring).

²⁰⁰ See *id.* (Reinhardt, J., & Hawkins, J., specially concurring).

²⁰¹ *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (quoting *Romero v. INS*, 39 F.3d 977, 980 (9th Cir. 1994)).

²⁰² See *Rodriguez-Roman*, 98 F.3d at 431.

²⁰³ See *id.* at 428.

²⁰⁴ See *id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* (quoting *Sovich v. INS*, 319 F.2d 21 (2d Cir. 1963)).

²⁰⁷ Persons who had illegally left China were subject to a brief initial detention and

court may review BIA determinations that do not utilize case law finding an alien subject to "severe penalties" despite a relatively minor sentence.

Reading *Rodriguez-Roman* as allowing easy entrance to all Cubans could cause increased tension between, on one hand, administrative agencies and conservative politicians and, on the other, the federal judiciary.²⁰⁸ Conservative politicians speak out against what they consider an "illegal immigration crisis" that causes overpopulation in schools, stress on welfare programs, and a soaring crime rate.²⁰⁹ In this setting, judicial review that grants asylum is considered overreaching, an abuse of authority, and "interpretive sinning."²¹⁰ The Ninth Circuit in *Rodriguez-Roman*, however, accented the "importance of treating the problem of political and religious refugees with sensitivity, compassion, and care."²¹¹ Government agencies sometimes do not remain the most objective because of "reasons ranging from partisan or political concerns"²¹²

In any event, the Ninth Circuit's ability to review future BIA holdings such as *Rodriguez-Roman* may be finished. On September 30, 1996, President Clinton signed The Illegal Immigration Reform Immigrant Responsibility Act of 1996 (IIRIRA).²¹³ According to the new law, a decision by the BIA denying asylum should not be disturbed unless it is "manifestly contrary to law," and an "abuse of discretion."²¹⁴ Under such a standard, it is unlikely that the Ninth Circuit would have heard Rodriguez's appeal.²¹⁵ One commentator noted that, "[t]he concept

a fine, but this was not considered "severe." See *Li v. INS*, 92 F.3d 985, 988 (9th Cir. 1996).

²⁰⁸ See Bruce Fein, *Sinned Against More Than Sinning*, WASH. TIMES, Nov. 26, 1996, at A15.

²⁰⁹ See Congressional Press Releases, Act of 1996, Sept. 24, 1996 (statement by Rep. Lamar Smith).

²¹⁰ See Fein, *supra* note 207, at A15.

²¹¹ *Rodriguez-Roman*, 98 F.3d at 433.

²¹² *Id.*

²¹³ Pub. L. No. 104-208, 110 Stat. 3009.

²¹⁴ See Gary E. Endelman, *Congress Tightens Its Controls*, N.J.L.J., Dec. 2, 1996, at 32.

²¹⁵ See Henry Weinstein, *Court Grants Asylum to Cuban Refugee*, L.A. TIMES, Oct. 10, 1996, at A3.

of discretionary review has been shaken to its very core . . . [with] the creation of a new legal universe."²¹⁶ Indeed, the Ninth Circuit's emphasis on the importance of judicial review may have been an indirect challenge to the passage of the IIRIRA.

V. Conclusion

The Ninth Circuit's holding in *Rodriguez* that an alien who faces "severe punishment" for violating an illegal departure statute may very well have saved a man's life.²¹⁷ Depending on the weight given to *Rodriguez-Roman*, it also may have allowed for any and all Cubans to find refuge in the United States, assuming they oppose the Communist system of Cuba.²¹⁸ The Ninth Circuit attempted to apply a "more rigorous" test by requiring that an alien seeking asylum based on a country's severe punishment for illegal departure prove he left the country for political reasons.²¹⁹ In essence, this added test becomes insignificant if achieved by the simple testimony of the asylum seeker. Under this test, as long as the alien knows what to say—that she abhors the Cuban government—she should gain asylum.

A resulting immigration influx would, according to some, result in a number of social ills to the United States and its citizens.²²⁰ Moreover, such a continued exodus would be contrary to the intent of the Clinton administration's agreement with Cuba.²²¹ Regardless of the side taken, the ability of courts to review BIA decisions like that of *Rodriguez-Roman* and provide relief have been greatly curtailed with the passage of the IIRIRA. Given the deference now accorded to the BIA, it will be interesting to see how the BIA interprets *Rodriguez-Roman* and the U.S.-Cuban agreement. Meanwhile, the lives of illegal aliens seeking refuge in the United States hang in the balance.

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²¹⁶ Endelman, *supra* note 213, at 32.

²¹⁷ See Parsons, *supra* note 58, at B1.

²¹⁸ See *supra* notes 184-93 and accompanying text.

²¹⁹ See *Rodriguez-Roman v. INS*, 98 F.3d 416, 430 (9th Cir. 1996).

²²⁰ See *supra* note 208 and accompanying text.

²²¹ See *supra* notes 6-12 and accompanying text.